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Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES and
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After a court exonerates bail securing the appearance of a defendant at criminal court proceedings, do county governments and state superior courts violate the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution by confiscating and using interest actually earned on cash bail deposits after exoneration, contrary to the principles established in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), thereby requiring the payment of just compensation to the depositors under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003)?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Mark A. Borenstein, *Overland Borenstein Scheper & Kim, LLP*, on behalf of *Mark E. Overland, Pamela Poloski and Overland & Borenstein LLP*, petitions for a writ of certiorari to review the judgment of the California Court of Appeal following denial of review by the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal entering judgment in favor of Respondents is unreported and is reprinted in the Appendix to the Petition for a Writ of Certiorari. *Overland v. Clarke,* Pet. App. 1-18.

JURISDICTION

On September 27, 2007, the California Court of Appeal entered its decision. On October 16, 2007, the Court of Appeal denied a petition for rehearing. On November 8, 2007, Petitioners timely filed for review in the California Supreme Court. On December 12, 2007, the California Supreme Court denied discretionary review. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The relevant sections of the California Penal Code are also reprinted in the Appendix. Pet. App. 27-28.

STATEMENT OF THE CASE

Factual Background

California, every other state and the District of Columbia have enacted a statutory bail system under which a cash deposit may be posted with a judicial officer or agency to secure the attendance of the defendant at all judicial proceedings. Additionally, all states recognize that bail remains posted until exonerated by the court when proceedings terminate and

there is no further need to secure the appearance of the defendant in court.[1]

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[1] Ala. Code §§ 15-13-111, 15-13-113 (ALABAMA 2005); Alaska Stat. § 12.30.020, Rules of Criminal Procedure, Rule 41(5) (ALASKA 2007); 16A A.R.S. Rule of Crim. Proc., Rules 7.1, 7.6 (ARIZONA 2007); A.C.A. § 16-84-115, A. R. Cr. P. Rule 9.2 (ARKANSAS 2007); Cal. Penal Code §§ 1297, 1298 (CALIFORNIA 2007); Colo. Rev. Stat. §§ 16-4-104, 16-4-108 (COLORADO 2007); Conn. Gen. Stat. §§ 54-66, 54-66A (CONNECTICUT 2007); Del. Code Ann. tit. 11, § 2102, Sup. Ct. Crim. R., Rule 46(f) (DELAWARE 2007); D.C. Const., Article I, Bill of Rights, SCR Crim. R. Rule 116 (DISTRICT OF COLUMBIA 2007); Fla. Stat. § 903.16, Fla. R. Crim. P. Rule 3.131 (FLORIDA 2007); Ga. Code. Ann. § 17-6-4 (GEORGIA 2007); Haw. Rev. Stat. §§ 804-11.5, 804-19 (HAWAII 2007); Idaho Code §§ 19-2921, 19-2923 (IDAHO 2007); 725 Ill. Comp. Stat. § 5/110-8 (ILLINOIS 2007); Ind. Code § 35-33-8-3.2 (INDIANA 2007); Iowa Code §§ 811.2, 811.10 (IOWA 2007); Kan. Stat. Ann. §§ 22-2802, 22-2808 (KANSAS 2007); Ky. Rev. Stat. Ann. §§ 431.520, 431.530 (KENTUCKY 2007); La. Rev. Stat. §§ 15:86, 15:88 (LOUISIANA 2007); Me. Rev. Stat. Ann. tit. 15, §§ 1026, 1074 (MAINE 2007); Md. Code Crim. Proc. § 5-205 (MARYLAND 2007); Mass. Gen. Law. ch. 276, §§ 68, 70, 79 (MASSACHUSETTS 2007); Mich. Comp. Laws §§ 765.12, 765.13, 765.15 (MICHIGAN 2007); Minn. Stat. § 629.53 (MINNESOTA 2007); Miss. Code Ann. § 99-5-9 (MISSISSIPPI 2007); Mo. Rev. Stat. § 544.455, Fifteenth Judicial Circuit Rules, Rule 67.1.4 (MISSOURI 2007); Mont. Code Ann. §§ 46-9-121, 46-9-401 (MONTANA 2007); Neb. Rev. Stat. §§ 29-901, 29-1110 (NEBRASKA 2007); Nev. Rev. Stat. §§ 178.502, 178.522 (NEVADA 2007); N.H. Rev. Stat. Ann. §§ 597:2, 597:3 (NEW HAMPSHIRE 2007); N.J. Stat. Ann. § 3:26-4 (NEW JERSEY 2007); N.M. Rules Crim. Proc., Rule 5-401, Rules Crim. Proc. Rules 6-401, 6-401B (NEW MEXICO 2007); N.Y. Gen. Mun. Law Ch. 24 § 99-m; Crim. Proc. Law § 500.10(9); N.Y. Gen. Mun. Law § 99m (NEW YORK 2007); N.C. Gen. Stat. §§ 15A-531(4), 15A-534(4) (NORTH CAROLINA 2007); N.D. Rules Crim. Proc., Rule 46 (NORTH DAKOTA 2007);

(Continued on following page)

In California, the cash deposit is held as security for a criminal defendant's appearance, and is exonerated and returned to the depositor after the defendant appears in court as required. Cal. Penal Code §§ 1297, 1298. In this case, after exoneration of cash bail deposited by Petitioners, Respondents returned the principal amounts of the bail deposits, but have refused to pay to Petitioners any of the interest actually earned after exoneration on their cash deposits by Respondents' investment of the cash principal. All 57 counties in California engage in the same practice, and Petitioners believe interest actually earned after exoneration of bail is not paid to cash depositors in any other state.[2] Accordingly all states

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Ohio Rev. Code Ann. § 2937.22(A) (OHIO 2007); 22 Okla. Stat. §§ 1106, 1107 (OKLAHOMA 2007); Or. Rev. Stat. § 135.265(3) (OREGON 2007); Pa. Rule Crim. Proc., Rules 528(D)(1), 536 (PENNSYLVANIA 2007); R.I. Gen. Laws § 12-13-10, Sup. Ct. R. Crim. P. Rule 46 (RHODE ISLAND 2007); S.C. Code Ann. §§ 15-17-750, 17-15-190 (SOUTH CAROLINA 2007); S.D. Codified Laws §§ 23A-43-3(4), 23A-43-26 (SOUTH DAKOTA 2007); Tenn. Code Ann. § 40-11-118, 40-11-132 (TENNESSEE 2007); Tex. Crim. P. Code Ann. §§ 17.02 (TEXAS 2007); Utah Code Ann. § 77-20-4(1)(a), 77-20-7 (UTAH 2007); 13 Vt. Stat. Ann. § 7554(a)(1)(F), Vt. R. Crim. Pr. Rule 46 (VERMONT 2007); Va. Code Ann. §§ 19.2-119, 19.2-123(3) (VIRGINIA 2007); 10 Rev. Code §§ 10.04.040, 18.85.100 (WASHINGTON 2007); W. Va. Code §§ 62-1C-2(a), 62-1C-12 (WEST VIRGINIA 2007); Wis. Stat. §§ 818.24, 969.02(2), 969.03(1)(d) (WISCONSIN 2007); Wyo. R. Cr. P. Rule 46 (WYOMING 2007).

[2] *See, e.g.*, N.H. Rev. Stat. Ann. § 597:3 (NEW HAMPSHIRE 2007) ("All money deposited for bail shall be held for the use of the state until the clerk of the superior court where the bail is deposited shall certify that no liability exists against the

(Continued on following page)

are routinely confiscating millions of dollars belonging to their citizens, contrary to constitutional mandates established by this Court.

In this case in three separate criminal prosecutions in the Los Angeles County Superior Courts, Petitioners deposited cash to secure the appearance of three defendants. On September 21, 2000, Petitioner Overland deposited $500,000; on December 20, 2002, Petitioner Poloski deposited $35,000; and on July 12, 2003, Petitioner Overland & Borenstein deposited $250,000. *Overland v. Clarke*, Pet. App. 3-5.

In each case, the clerk of the superior court transferred the cash deposit to the Los Angeles County's auditor-controller, who deposited the money into a Los Angeles County trust fund called the "TK7 Trust Fund." The County invested the cash bail deposits and during the time period which is the subject of this action, earned an annual rate of return on the deposited cash between 2.45% and 6.38%. The interest actually earned was transferred to the Los Angeles County General Fund for general fiscal purposes. After exoneration, the cash was held and invested by Respondents for 42 to 45 days before

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bail."); Wyo. Stat. § 7-10-105 (WYOMING 2007) ("Any proceeds recovered as a result of the forfeiture of bail in any criminal case shall be paid into the county treasury to the credit of the public school fund of the county in which the defendant was admitted to bail."); but cf. Tex. Crim. P. Code Ann. § 22.16 (TEXAS 2007) (surety entitled to accrued interest less costs after forfeiture).

being delivered without interest to Petitioners. *Id.* at 4-5.

Each Petitioner demanded the interest earned on the bail from the date of exoneration to the date the principal deposit was refunded to the Petitioners. No interest payments have been made to Petitioners despite their demands. *Id.*

Proceedings Below

On September 26, 2003, Petitioners filed a complaint in the Los Angeles County Superior Court against the Respondents alleging, among other claims, the taking without compensation of the interest actually earned on their cash bail deposits in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The first cause of action demanded the return of interest earned before exoneration of the cash deposit; the second cause of action demanded return of interest earned after exoneration of bail by the superior court. Petitioners brought the action on behalf of themselves and all persons similarly situated. *Id.* at 5.

The Superior Court and its Clerk moved for judgment on the pleadings or, in the alternative, demurred to all claims asserted against them. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), but otherwise sustained the demurrers without leave to amend with regard to the first cause of action, for pre-exoneration interest.

Thereafter, Petitioners filed a petition for writ of mandate seeking review of the trial court's order sustaining the demurrer to their first cause of action. *Id.* at 6-7.

The California Court of Appeal denied the petition. It held that the decisions of this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), were inapplicable because they involved an "involuntary" taking of the interest earned on cash deposits, whereas in this case, Petitioners' cash deposits were "voluntary," as part of an implied unwritten contract. According to the California court, the contract was implied from California statutes, and the "[t]erms of the contract do not include a provision for interest on the deposit." Accordingly, the Court reasoned there could be no Takings claim. The Court of Appeal did not rule on the merits of the second cause of action for the taking of post-exoneration interest. *Id.* at 7-8, 13.

On May 11, 2005, the California Supreme Court denied discretionary review. Pet. App. 22.

Petitioners' Petition for Writ of Certiorari filed with this Court was denied on October 11, 2005. Pet. App. 23.

Following remand, all parties filed cross-motions for summary judgment on the second cause of action relating to post-exoneration interest. *Overland v. Clarke*, Pet. App. 9-10. On May 15, 2006, the trial

court granted Respondents' motion and denied Petitioners' motion, holding that interest earned post-exoneration is governed by the same contract principles established by the Court of Appeal in its prior decision relating to the first cause of action involving pre-exoneration interest. *Id.* at 10-11.

On June 29, 2006, the superior court entered judgment in favor of Respondents and on August 28, 2006 Petitioners filed notice of appeal from the judgment of the court. Pet. App. 19-21.

On September 27, 2007, the Court of Appeal, in an unpublished opinion, affirmed the judgment and on October 16, 2007, denied Petitioners' petition for rehearing. *Overland v. Clarke*, Pet. App. 1-18, 24-25.

On December 12, 2007, the California Supreme Court denied discretionary review. Pet. App. 26. Accordingly, under Rule 13-1, this Petition is timely.

SUMMARY OF ARGUMENT

Since at least the mid-1700's, English common law has recognized that "interest follows principal." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998). California also adheres to this long-established principle. *See Pomona City School Dist. v. Payne*, 9 Cal.App.2d 510, 512 (1935) ("interest accretions belong to [the] owner"). In applying this rule, this Court repeatedly has held that interest

earned on a cash deposit – whether an IOLTA Trust deposit, state court interpleader deposit or otherwise, is the property of the depositor along with the principal amount of the cash deposit. When the state appropriates the depositor's accrued interest, the state effects a *per se* physical taking under the Fifth Amendment, for which reasonable compensation is due. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), the property taken was the interest earned on an interpleader deposit. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the property taken was the interest actually earned on IOLTA trust accounts. In these cases, as in others, the cash deposit was not compelled and in each case, the depositor arguably obtained a benefit from making the cash deposit. Contrary to the decision of the California court below, this Court held in each of these cases the earned interest was involuntarily taken. Also contrary to the decision of the California court below, lower federal courts have consistently held that the unavailability of a contract remedy does not automatically preclude a Takings claim.

The Court of Appeal's decision here concerning post-exoneration interest conflicts with decisions of this Court and lower federal courts on a fundamental Fifth Amendment question that affects millions of people in this country and likely involves many millions of dollars in unlawfully confiscated interest.

Additionally, the Court of Appeal decision ignores the purpose of bail, which prevents the state from exercising control over bail deposits following exoneration of the bail.

Contrary to *Webb's Fabulous Pharmacies*, *Phillips* and *Brown*, the California Court of Appeal held Respondents did not engage in an unconstitutional taking by retaining interest earned after exoneration of Petitioners' cash bail deposit. Rather, the Court of Appeal decided the taking of the interest earned on the cash following exoneration was authorized by a contract which was implied from the California bail statutes. The Court of Appeal therefore made no distinction between interest earned *before exoneration* as part of the implied contract between depositor and Respondents, and interest *earned after exoneration* when the implied contract terminated. Even though the interest actually earned after exoneration was a separate *res* that was created entirely after the purpose of the bail deposit was fully satisfied, and under the "interest follows principal" belonged to the cash bail depositor, the court below still implied a waiver by the depositor of the interest earned after exoneration, because the bail statutes did not expressly provide for the payment of interest when the cash deposit was returned. The Court of Appeal therefore interpreted statutory law to confiscate the post-exoneration earned interest in exactly the same way the lower courts in Florida relied on the express provisions of a state statute to justify the taking of

the interest earned on interpleader deposits in *Webb's Fabulous Pharmacies*.[3]

Under the Fifth and Fourteenth Amendments, Petitioners' constitutional rights against the taking of private property without just compensation may not be abrogated either by characterizing the earned interest as subject to an express statutory mandate or an implied statutory term. After exoneration by a court, bail deposits are clearly beyond the control of the state and any interest earned on those deposits belongs to the depositor. Allowing the state to confiscate that interest without just compensation offends Fifth Amendment principles established by this Court. Accordingly, this Court should grant this petition for certiorari under Rule 10(c) of the United States Supreme Court Rules and address the conflict created by the California Court of Appeal "with relevant decisions of this Court."

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[3] In fact, the case against finding an unlawful confiscation was stronger in *Webb's Fabulous Pharmacies* than here, since there was nothing the lower Florida courts needed to imply to justify the taking. Unlike here, the lower courts in Florida permitted the taking of the interest based on a Florida statute that expressly provided the interest would be retained by the court. Nevertheless, this Court found the taking of the interest violated the Fifth Amendment.

ARGUMENT

I. INTEREST ACTUALLY EARNED AFTER EXONERATION ON A CASH DEPOSIT IS THE PRIVATE PROPERTY OF THE DEPOSITOR; WHEN A COUNTY OR COURT DOES NOT RETURN THE INTEREST TO THE DEPOSITOR, A *PER SE* TAKING OF PROPERTY SUBJECT TO THE TAKINGS CLAUSE RESULTS.

In order to establish a claim for an unconstitutional taking of property, Petitioners must first show the property taken is their private property. *See Ruckleshouse v. Monsanto Co.*, 457 U.S. 986, 100-1001 (1984); *Phillips*, 524 U.S. at 164. Here, Petitioners deposited their property – cash – in lieu of bail according to the California Penal Code statutes governing bail. *See, e.g.*, Cal. Pen. Code § 1297. California, by statute, recognizes that, after exoneration, this cash deposit is no longer subject to control by the government, but must be returned to the depositor. Cal. Penal Code § 1297.

This statutory recognition of the government's duty to forego control over the cash deposit once bail serves no valid function comports with the recognized purpose of bail. "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court." *Reynolds v. United States*, 80 S.Ct. 30, 32 (1955). *See United States v. Ryder*, 110 U.S. 729, 736 (1884) ("the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice."). California

also has long recognized this self-evident principle. "The object of bail is to insure the attendance of the principal and his obedience to the orders and judgment of the court. There should be no suggestion of revenue to the state or county, nor punishment to the surety." *People v. Wilcox*, 53 Cal.2d 651, 698 (1960).

Therefore, a trial court exonerates bail when no further appearance by a defendant or compliance with court orders is required. Both such duties of the defendants in this case and the right of the Respondents to control the bail ended on exoneration of bail by the court. As of that time, the bail deposits no longer secured the obligations of the criminal defendants to appear in court and obey release conditions, and Respondents had no right to control the cash bail deposits. Respondents lawfully could only return the deposits to Petitioners, whose right to the return of the cash bail principal at exoneration was settled. Along with that cash principal, Respondents' right to any interest earned thereon also was fixed at exoneration.

Beginning with *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161, this Court has consistently held that the interest earned on a cash deposit is the property of the depositor under the "interest follows principal" rule. *See also Phillips*, 524 U.S. at 165 ("rule that 'interest follows principal' has been established under English common law since at least the mid-1700's."). California follows this rule. *Pomona*

City School Dist. v. Payne, 9 Cal.App.2d 510, 512 (1935) ("interest accretions belong to [the] owner").

Accordingly, not only is the principal which earned the interest after exoneration the property of the depositor, but so is the earned interest. *Phillips v. Washington Legal Foundation*, 524 U.S. at 172. *See Anderson v. Spear*, 356 F.3d 651, 670 (6th Cir. 2004) (left over campaign contributions); *Schneider v. California Department of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003) (interest on prisoner deposits cannot be appropriated for benefit of entire prison population); *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (same); *Arthur v. District of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004) (appropriation of interest on interpleader funds deposited into court registry constitutes an unconstitutional taking); *Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct., 2003) (dividends on stock temporarily held by state).

In *Webb's Fabulous Pharmacies*, this Court decided that a state violated the Takings Clause when it appropriated for itself, pursuant to state statute, the interest accrued on an interpleader fund deposited in the registry of a county court. "The usual and general rule is that any interest on the interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 162. *Brown* declared that the confiscation of the interest accrued on temporary cash

deposits is a *per se* taking[4] under the Fifth Amendment, because the accrued interest was physically taken:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [citation], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

Brown, 538 U.S. at 233. In *Phillips*, 524 U.S. at 172, this Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."

Here, like in *Webb's Fabulous Pharmacies*, Petitioners made cash deposits held temporarily by the state. Petitioners' deposits earned interest in the Los Angeles County TK7 Trust Fund after exoneration of the cash bail. In addition, like *Webb's Fabulous Pharmacies* where the interest actually earned on the cash was kept by the circuit court, the interest here was transferred to the Los Angeles County General Fund for general fiscal purposes. In *Webb's Fabulous Pharmacies*, the state statute declared the interest to be "income of the office of the clerk," *id.* at 449 U.S.

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[4] The Legislature may impose a reasonable user fee for costs reasonably related to handling and returning cash bail, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 163, but the California Legislature has not chosen to do so. *See infra* Section III.

156 note 1; in this case, the Court of Appeal determined the interest was owned by the County since the bail statutes contained an implied contract that did not expressly require the interest be paid to the depositor. *Overland v. Clarke*, Pet. App. 8.[5]

Moreover, contrary to the holding of the California Court of Appeal, established lower federal precedent makes clear that the unavailability of a contract remedy does not automatically preclude a Fifth Amendment Takings claim. Lower federal precedent holds that a viable breach of contract claim precludes a Takings claim. But the converse has never been held true, until the decision of the Court of Appeal here. *See System Fuels, Inc. v. United States*, 65 Fed.Cl. 163, 172-73 (2005) ("It is appropriate to proceed with both claims until the contract claim reaches fruition. Only after the contract claim has been fully litigated will it be possible to determine if the contract claim is viable"; valid contract claim "trumps" the Takings claim); *Sinclair v. United States*, 49 Fed.Cl. 274, 280 n. 7 (2001) ("Plaintiff's takings theory need be addressed only if he fails on his contract claim."). If there is no valid contract claim, the viability of a Takings claim depends instead on the origin of the right sought to be enforced. It is only where the duty breached by the government is created solely by the contract that the only remedy

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[5] Nor did the Court of Appeal explain why it rejected the equally logical conclusion that the absence of anything in the statute about interest meant that the post-exoneration interest was owned by the principal depositor, rather than Respondents.

is contractual. *See Boston Edison Co. v. United States*, 64 Fed.Cl. 167, 187 (2005) (no summary judgment because triable issue of fact as to whether rights taken by government "derive from" contract and are unavailable under contract); *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336, 1342-1343 (Fed. Cir. 2000) (permitting plaintiff to maintain takings claim, since it "did not arise under the contract"); *Commonwealth Edison Co. v. United States*, 56 Fed.Cl. 652, 656 (2003) ("rights existing independently of a contract are not generally restricted to contractual remedies."); *Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 42 Fed.Cl. 30, 34-35 (1998) (Takings claim not dismissed because court could not conclude whether contract conferred the rights at issue). Here the post-exoneration interest *res* has its origin in the "interest follows principal" rule that has existed for approximately 300 years, independent of any implied contractual rights between depositor and the state. *See Phillips*, 524 U.S. at 165. Accordingly, contrary to the rule established by the Court of Appeal below, the unavailability of a state contract remedy cannot preclude the existence of a constitutional Taking of interest claim.

Just as in *Webb's Fabulous Pharmacies*, *Brown* and *Phillips*, the principal amount of the cash deposit after exoneration is the property of the depositor. Indeed, none of the parties herein, including Respondents, have ever claimed that Respondents were not required to return the cash deposit principal to the original depositor. Because "interest follows principal," the earned interest on the cash deposit principal

belongs to the depositor, regardless of the reason given by the lower court to confiscate the private property of the depositor for public use.[6]

II. THE CALIFORNIA COURT OF APPEAL'S DECISION IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS AS WELL AS THOSE OF LOWER FEDERAL COURTS.

The presence or absence of statutory authority directing the retention of interest earned on funds deposited with a governmental entity does not determine the constitutionality of the retention. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 162. The state "by *ipse dixit* may not transform private property into public property without compensation." *Id.* at 164. This prohibition applies regardless of how the state

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[6] Because these proceedings result from a grant of summary judgment, there is no occasion for the Court to decide whether compensation in some amount is due. After the threshold issue – whether private property was taken – is finally decided, the trial court must decide if any compensation must be paid. *Phillips*, 524 U.S. at 173. The amount of just compensation due on interest taken by the state is determined by the plaintiff's net loss, calculated by subtracting the amount of interest accrued from the costs of administering the principal. *Arthur v. Dist. of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004); *Schneider v. California Dep't of Corrections*, 345 F.3d 716, 720-721 (9th Cir. 2003); *McIntyre v. Bayer*, 339 F.3d 1097, 1101 (9th Cir. 2003); *see also Butler v. Michigan State Disbursement Unit*, 275 Mich.App. 309, 738 N.W.2d 269 (2007); *Canel v. Topinka*, 342 Ill.App.3d 65, 76, 276 Ill.Dec. 86, 793 N.E.2d 845 (2003).

acts, whether by judicial decrees or legislation. *Id.* In *Schneider v. California Dep't of Corrections*, 151 F.3d 1194 (9th Cir. 1998), for example, the Ninth Circuit held that a state law requiring the interest actually earned on inmate trust funds to be paid to the Department of Corrections does not insulate the state from an unconstitutional taking. *Schneider* quoted the "*ipse dixit*" language from *Webb's Fabulous Pharmacies*, and concluded the state is not protected from Fifth Amendment liability because a statute expressly appropriates the interest:

> [I]n *Phillips*, [the Court] refused to accord the Texas IOLTA rules – which purported to divest clients of ownership of the interest income in IOLTA accounts – any talismanic significance. Rather, the Court reiterated that 'a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.' The *Webb's* and *Phillips* decisions are therefore similar to one another (and germane to this case) in a critical respect: In both cases, the Court relied, in the face of a contrary state statute, upon the traditional common law rule that 'interest follows principal' in recognizing a protected property interest in earned interest income.

Id. at 1200.[7]

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[7] Following remand, the Ninth Circuit reaffirmed that under *Brown*, "it is clear under [the] *per se* analysis that California's

(Continued on following page)

Here the case for the taking of Petitioners' property contrary to protections guaranteed by the Fifth Amendment is even stronger, since there was no statute that expressly appropriated the interest on cash bail deposits after exoneration.[8] Instead, the California Court of Appeal *implied* a right for the County and the Court Clerk to take the interest accrued after exoneration from its judicially created implied contract-like relationship that arose, before exoneration, from the California bail statutes. According to the Court of Appeal, "the cash bail deposit was in the nature of a contract between the depositor and the government," and "[t]he terms of the contract did not include a provision for interest on the deposit." *Overland v. Clarke*, Pet. App. 8. The California Court, in effect, substituted an implied contract-like relationship based on statute for the express statutory authorizations found ineffective to avoid Fifth Amendment liability in *Webb's Fabulous Pharmacies*, *Phillips* and *Schneider*. If a state statute cannot expressly convert private property into public property, neither can a judicial opinion purporting to create an implied statutory term to the same effect. Regardless of the method used by the state to appropriate the

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scheme perpetuates a taking because it appropriates the interest earned by the ITA's and allocates them for public use." *Schneider v. California Dep't of Corrections*, 345 F.3d 716, 720 (9th Cir. 2003).

[8] The argument for an unconstitutional taking is also stronger since there is no constitutional right to an interpleader deposit here, whereas there is a constitutional right to bail.

interest earned on the cash deposit, interest is still the private property of the depositor taken for a public use which requires compensation to its owner.

The California Court's finding of an implied waiver of the constitutional right to compensation from the taking of the accrued interest is also contrary to this Court's established waiver precedent. There can be no waiver of a constitutional right absent "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 308 U.S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *College Sav. Bank v. Florida Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). *See Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio,* 301 U.S. 292, 307 (1937) ("We do not presume acquiescence in the loss of fundamental rights."). An effective waiver of a constitutional right must be made knowingly, intelligently and voluntarily. *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972).

The implied bail deposit contract-like relationship found by the California Court does not provide average depositors with specific notice that they are forfeiting their constitutionally protected property right in the interest earned on their deposit before exoneration. The implied contract certainly does not provide a depositor with such notice for the interest

earned after exoneration when the bail contract ends. Moreover, prior opinions of this Court and lower federal courts finding unconstitutional takings involved a state's decision to appropriate interest actually earned on cash deposits despite the depositor's knowledge that the state claimed it did not have to pay interest. The depositors in *Brown*, in *Webb's Fabulous Pharmacies*, in *Schneider v. California Dep't of Corrections*, 345 F.3d 716, and in *McIntyre v. Bayer*, 339 F.3d 1097, all knew that the state claimed the interest actually earned by statute or rule. Yet none of these decisions found an implied waiver of the constitutional right to just compensation when private property was appropriated for public use. In this case, there is nothing in the record that demonstrates Petitioners' intentional relinquishment of their Fifth Amendment protection against the taking of their property without just compensation.

Furthermore, the California Court's analysis that there is no unconstitutional taking of interest because the initial deposit of the principal is "voluntary" is likewise fundamentally flawed. There can be no doubt that the retention of cash bail interest after exoneration cannot be justified on the basis of the voluntary deposit of the principal with the understanding that it will be returned once the defendant fulfills all bail conditions. The initial voluntary deposit of the principal does not constitute consent to the government's right to confiscate the interest earned thereon after later exoneration. On the contrary, the retention of

interest by the government is a *per se* taking contrary to the protections of the Fifth Amendment to the United States Constitution. *Phillips v. Washington Legal Foundation*, 524 U.S. 156; *Brown v. Legal Foundation of Washington*, 538 U.S. at 235. *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (same); *Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct., 2003), *aff'd*, 206 Ill. 2d 311 (2004). *See also Anderson v. Spear*, 356 F.3d 651, 670 (6th Cir.), *cert. denied*, 125 S.Ct. 453 (2004); *Arthur v. District of Columbia*, 857 A.2d 473, 492 (D.C. Cir. 2004).

In all of these decisions the initial deposit of the principal was voluntary; in each, the taking of the interest (or dividends) was held to violate the Takings Clause. The voluntariness of the initial deposit is irrelevant to the subsequent involuntary taking of the interest thereon. As stated by the appellate court in *Arthur v. District of Columbia*, 857 A.2d at 492, n. 23:

> the District's argument that Mr. Arthur voluntarily deposited $14,450.00 in the court registry, and hence the takings clause does not apply, is unavailing. While Mr. Arthur voluntarily deposited the $14,450.00 . . . he did not by that action signal that the government had a right to take and use private funds resulting from the sale of private property, including interest thereon, in any way it deemed necessary or appropriate.

III. THE TAKING OF ALL INTEREST EARNED CANNOT BE CONSIDERED A REASONABLE FEE FOR SERVICES RENDERED.

Petitioners acknowledge that a state legislature may assess a reasonable user fee on cash bail deposits that is "reasonably related to the costs of using the courts." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163. But in California and likely elsewhere, such fees *only* can be imposed by statute. *See e.g.*, *Vance v. Barrett*, 345 F.3d 1083, 1089 (9th Cir. 2003) ("[w]ithout a statutory mandate, prison officials had no authority to confiscate inmates' property"). To impose a fee without statutory authority would violate Petitioners' rights to due process. *Id.* at 1090-1091 ([w]ithout underlying authority and competent procedural protections, NDOP could not have constitutionally confiscated the net accrued interest."). *See Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985) (administrative agency has no right without underlying statutory authority to enforce forfeitures of property; "when it does so, it violates the due process clause.").

Moreover, a user fee must bear a reasonable relationship to the "costs of administering the . . . cash bail program." *Buckland v. County of Montgomery*, 812 F.2d 146, 148 (3d Cir. 1987). *See Phillips*, 524 U.S. at 171; *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (user fee must be a "fair approximation of the cost of benefits supplied"). Here, Respondents cannot justify a user fee equal to 100% of the interest actually earned after exoneration, an exaction that has no rational relationship between any identifiable

costs and the interest actually earned. The interest actually earned depends on the amount of cash deposited, the rate of interest and the length of time the cash remained in the possession of Respondents after exoneration of the bail. There is no showing in the record that the cost of returning the cash bail deposits (or to calculate the interest actually earned on the cash deposit) after exoneration is any greater for the Overland deposit of $500,000, than it is for a cash deposit for an alleged traffic violator who posted a relatively small amount of cash.

In any event, the California Legislature has not authorized any user fee.[9] The Legislature may enact a reasonable user fee in the future for prospective cash bail depositors. But the taking of the depositor's entire accrued interest without just compensation as an implied user fee offends the Fifth Amendment.

CONCLUSION

For approximately 300 years, common law principles have recognized that "interest follows principal." This Court has repeatedly stated that interest earned on a principal deposit is the private property

[9] Michigan appears to assess a user fee for cash bail deposits, a flat fee of $10. *See* Mich. Comp. Laws § 765.12a (2005). Michigan also directs that any "interest accumulating upon such fund [where cash is deposited] shall be paid into the general fund or corresponding fund of the state, county, city, village or township." Mich. Comp. Laws § 765.17 (2005).

of the depositor. When the State appropriates the interest actually earned on the deposited principal, the Fifth Amendment is implicated. This action by the State is a *per se* confiscation that requires the trial court to determine what compensation, if any, is due to the owner. The California Court of Appeal's implied contract-like theory, under which the depositor impliedly agreed to forego interest earned on bail deposits earned after exoneration because there is nothing in the cash bail statutes that directs the interest must be returned to the depositor, disregards established precedent of this Court as well as the decisions of lower federal courts. Furthermore, the failure of the California Legislature to explicitly require payments of that interest does not relieve the judiciary of its constitutional obligation to ensure that just compensation be paid. In light of the widespread national practice of taking interest earned after exoneration of cash bail deposits and given the large amounts of interest actually being taken nationwide on a daily basis, the petition for a writ of certiorari should be granted to decide this important Fifth Amendment issue that conflicts with relevant decisions of this Court.

Respectfully submitted,

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARK E. OVERLAND et al., Plaintiffs and Appellants, v. JOHN A. CLARKE, as Executive Officer and Clerk, etc., et al., Defendants and Respondents.	B193743 (Los Angeles County Super. Ct. No. BC302996) (Filed Sept. 27, 2007)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald L. Bauer, Judge.* Affirmed.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Overland Borenstein Scheper & Lim, Mark A. Borenstein for Plaintiffs and Appellants.

Morrison & Foerster, David F. McDowell and Sylvia Rivera for Defendants and Respondents Superior Court of California, County of Los Angeles, and John A. Clarke, Executive Officer and Clerk of the Superior Court of California, County of Los Angeles.

Manning & Marder, Kass, Ellrod, Ramirez, Patrick L. Hurley and Sylvia E. Havens for Defendants and Respondents J. Tyler McCauley and County of Los Angeles.

Plaintiffs and appellants Mark E. Overland (Overland), Overland & Borenstein LLP (O & B) and Pamela Poloski (Poloski) (collectively, plaintiffs) appeal a judgment following a grant of summary judgment in favor of defendants and respondents Superior Court for the County of Los Angeles, John A. Clarke, the court's executive officer and clerk (the court defendants) as well as the County of Los Angeles and J. Tyler McCauley, the county's auditor-controller (the county defendants) (collectively, defendants).

The issue presented is whether defendants' refusal to pay the plaintiffs post-exoneration interest on their cash bail deposits constitutes a taking of private property for which plaintiffs are entitled to just compensation.

The obligation herein is contractual and is defined by statute as well as by the language of the

contract. The statutory scheme does not provide for exoneration and refund of the bail deposit to occur simultaneously. (Pen. Code, § 1297 [deposit to be returned within 10 days after depositor submits claim].)[1] Unreasonable delay in returning the bail deposit conceivably could give rise to a contract claim. However, delay in returning the bail deposit does not amount to an unconstitutional taking. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background.*

On September 1, 2000, attorney Overland posted cash bail with the Los Angeles County Sheriff's Department in the amount of $500,000 by way of a cashier's check to secure the release of his client, Abdul Aziz Mohd Alkhelaifi in *People v. Alkhelaifi* (Super. Ct. L.A. County, No. BA206456).[2] Overland

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] The statutory scheme in the Penal Code "provides various alternatives for posting bail. A defendant may be released from custody upon (1) execution of a bail bond or undertaking of bail by an admitted surety insurer ([ ] § 1276); (2) deposit by the defendant or any other person of cash in the amount of the bail (§§ 1295, 1296); (3) deposit by the defendant or any other person of bonds of the United States or State of California 'of the face value of the cash deposit required' (§ 1298); or (4) provision by the defendant or any other person of equity in real property equal to twice the amount of the cash deposit required (§ 1298)." (*Overland v. Superior Court* (2005) 126 Cal.App.4th 131, 141 (*Overland I*).

did not use his own money for the cash bail deposit but he was the depositor. The sheriff transferred the $500,000 to the superior court clerk, who deposited the bail money with the county's auditor-controller into the Los Angeles County TK7 Trust Fund on September 21, 2000.[3] On June 19, 2001, the $500,000 bail was exonerated by court order. A check dated July 26, 2001 was issued to Overland in the amount of $500,000; the envelope containing the check was postmarked August 3, 2001. No interest was included with the refund payment. Overland made two requests to the superior court's accounting division for interest on the deposit. No interest was paid to him.

Pamela Poloski deposited cash bail on December 20, 2002, in the amount of $35,000 by way of cashier's check to secure the presence of Robert Poloski in *People v. Robert Alan Poloski* (Super. Ct. L.A. County, No. PA042651). The procedures followed in the *Alkhelaifi* case also were used in the *Poloski* action. On February 10, 2003, the $35,000 bail was exonerated. Poloski did not receive the $35,000 back until about March 25, 2003. No interest was included with the refund payment.

O & B is a law firm which, on July 12, 2003, deposited cash bail in the amount of $250,000 by way

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[3] Money deposited into the TK7 Trust Fund earns interest which is deposited into the Los Angeles County general fund for general fiscal purposes. For the period January 1, 2000 to December 31, 2002, the fund held in the TK7 Trust Fund earned a rate of return between 2.45 and 6.38 percent.

of a cashier's check to secure the appearance of Leonard McSherry in *People v. Leonard James McSherry* (Super. Ct. L.A. County, No. 3BH00547-01). The money belonged to McSherry. The $250,000 bail was exonerated on July 25, 2003. The cash bail was returned to O & B on September 5, 2003, without interest.

2. *Pleadings.*

On September 26, 2003, the three plaintiffs filed the instant action for "unlawful taking without compensation; unjust enrichment; injunctive relief; declaratory relief and petition for writ of mandate to compel payment of interest."

The complaint's first cause of action pled an "unlawful taking of property without compensation against all defendants-interest earned between deposit and exoneration."

The second cause of action alleged an "unlawful taking of property without compensation against all defendants-interest earned between exoneration and return."

Additionally, the complaint pled a cause of action for unjust enrichment, and requested injunctive and declaratory relief, as well as a writ of mandate directing defendants to pay interest on cash bail deposits.

The complaint also requested private attorney general fees pursuant to Code of Civil Procedure section 1021.5.

3. *Trial court sustained demurrer without leave to amend as to first cause of action for pre-exoneration interest; in Overland I we upheld that ruling.*

The court defendants filed a motion for judgment on the pleadings or, in the alternative, demurrers to all claims asserted against them in the complaint. The matter was heard in the Orange County Superior Court. On March 17, 2004, the trial court overruled the demurrer to the second cause of action (relating to post-exoneration interest), and otherwise sustained the demurrers without leave to amend. With regard to the first cause of action, for *pre-exoneration* interest, the trial court ruled *Fresno Fire Fighters v. Jernagan* (1986) 177 Cal.App.3d 403 (*Fresno*) controlled and precluded an award of interest. As to the second cause of action, for post-exoneration interest on bail, the trial court determined the *Fresno* case did not control.[4]

Plaintiffs thereafter brought a petition for writ of mandate, seeking review of the trial court's order sustaining the demurrer to their first cause of action without leave to amend. Plaintiffs contended that in light of the United States Supreme Court's decisions in *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156 [141 L.Ed.2d 174] (*Phillips*) and *Brown*

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[4] Plaintiffs and the county defendants subsequently stipulated the trial court's March 17, 2004 order on the demurrers interposed by the court defendants "will be deemed applicable" to the county defendants.

v. Legal Foundation of Wash. (2003) 538 U.S. 216 [155 L.Ed.2d 376] (*Brown*), the Court of Appeal's decision in *Fresno, supra,* 177 Cal.App.3d 403, was no longer good law, and their first cause of action stated a claim for an unconstitutional taking of pre-exoneration interest without just compensation. We issued an order to show cause.

In *Overland I,* we denied the petition for writ of mandate, ruling the defendants' retention of pre-exoneration interest did not amount to a taking. We held plaintiffs' reliance "upon *Phillips* and *Brown* is misplaced. Those cases involved the involuntary taking by the government of private property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use, namely, to fund legal services for low income individuals. Those circumstances implicate the Fifth Amendment, which requires the payment of just compensation when private property is taken for public use. However, those constitutional concerns are absent here. [¶] The court defendants' refusal to pay petitioners interest on their cash bail deposits does not constitute a 'taking' because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when [plaintiffs] voluntarily deposited cash bail to free the criminal defendants from custody, [plaintiffs] entered into contracts with the government by which [plaintiffs] guaranteed the appearance of the criminal defendants released on bail at all required court proceedings." (*Overland I, supra,* 126 Cal.App.4th at p. 140.)

Thus, the taking principles implicated in interest on lawyers trust account (IOLTA) cases were inapplicable – the cash bail deposit is in the nature of a contract between the depositor and the government. (*Overland I, supra,* 126 Cal.App.4th at p. 140.) The contractual obligation "is defined by statute as well as by the language of the contract. [Citation.]" (*Id.* at p. 141.) The terms of the contract do not include a provision for interest on the deposit. (*Id.* at p. 140.) Further, the statutory scheme governing bail, section 1268 et seq., does not require the payment of interest on cash bail deposits and the Legislature has made no provision therefor. (*Overland, supra,* at p. 141.)

In sum, "the quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody. The contracts did not include a provision that [plaintiffs] would earn interest on the cash bail deposits." (*Overland I, supra,* 126 Cal.App.4th at p. 142.) Therefore, we concluded plaintiffs were incapable of stating a cause of action for denial of pre-exoneration interest on their cash bail deposits and denied plaintiffs' petition for writ of mandate. (*Ibid.*)[5]

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[5] In *Overland I,* we also addressed the *Fresno* decision, on which the trial court had relied in ruling on the demurrer. *Fresno* held a county's retention of interest accrued on cash bail deposits in criminal proceedings is not an unconstitutional taking of private property. (*Fresno, supra,* 177 Cal.App.3d at p. 413.) The *Fresno* court reasoned that bail money is deposited for a public purpose, namely, securing a defendant's appearance,

(Continued on following page)

Following the issuance of *Overland I,* the California Supreme Court denied plaintiffs' petition for review and the United States Supreme Court denied a petition for writ of certiorari.

4. *Subsequent proceedings.*

Following the resolution of *Overland I,* which involved *pre-exoneration* interest, plaintiffs filed a motion for summary judgment or summary adjudication with respect to their cause of action for post-exoneration interest. Plaintiffs contended the bail contracts terminated upon exoneration, when the trial court ordered return of the cash bail. However, the money was not immediately returned to plaintiffs. Forty five days elapsed between the date of exoneration and the date the bail was returned to Overland, and 42 days elapsed as to Poloski and O & B, during which time interest continued to accrue on the deposits. Plaintiffs argued defendants' retention

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and the interest earned thereon is reasonably needed to support the court system. (*Id.* at p. 412.)

We concluded that with respect to pre-exoneration interest, *Fresno's* rejection of a claimed right to interest on cash bail in criminal proceedings was correct in result. However, we disagreed with *Fresno's* rationale. The reason there is no right to pre-exoneration interest on cash bail is not that the money was deposited for a public purpose. Rather, no interest is owed because the bail deposit is made in accordance with the terms of a particular contract and the terms of that contract do not include a provision for pre-exoneration interest. (*Overland, I, supra,* 126 Cal.App.4th at p. 142.)

of the interest earned on the deposits after exoneration amounts to a taking of property for general county purposes, entitling them to just compensation.

The county defendants filed a competing motion for summary judgment/summary adjudication. The court defendants also filed a motion for summary judgment, or in the alternative, for judgment on the pleadings. Defendants' papers contended plaintiffs lacked standing because they did not use their own money to post bail; plaintiffs were collaterally estopped from seeking post-exoneration interest; the return of the bail deposits within a matter of weeks was reasonable as a matter of law; and there was no "taking" to implicate the Fifth Amendment.

On May 15, 2006, the matter came on for hearing. The trial court denied plaintiffs' motion and granted defendants' motions and ordered entry of judgment in favor of defendants.[6]

In ruling on the matter, the trial court stated: "[t]he claims presented for the takings assertion, some constitutional deprivation, don't survive the *Overland* [*I*] analysis that I've read in that appellate opinion. Whether it be before exoneration or after exoneration, the question about the constitutional rights here I think has been resolved. This contract

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[6] It is unclear from the record whether the trial court granted judgment on the pleadings or summary judgment in favor of defendants. The trial court merely ordered "entry of judgment."

necessarily requires that it run its course through the reasonable opportunity to return the bail. [¶] . . . [T]hat can't be an instantaneous event. . . . [¶] . . . I think that's an unreasonable interpretation of the circumstances. The contract has to be read as running through completion, and through completion of the purpose of this voluntary contract includes the time necessary for a careful and reasoned and proper return of the money. It can't be done instantaneously. Everyone has acknowledged that that's the case. [¶] And therefore I think that the contract that is described in the *Overland* case is still in play, it's a voluntary undertaking by the bailor who recognizes that he or she had alternatives and they're all described in that case and chose this one. And that contact [sic] does not provide, by its terms, for any interest to the benefit of the bailor. And I think that's the result that follows here, just as well as it followed in the first version of this case."

Plaintiffs filed a timely notice of appeal from the judgment.

CONTENTIONS

Plaintiffs contend the trial court erred in granting defendants' motion for summary judgment and in denying plaintiffs' competing motion because defendants' retention of interest earned after the trial court exonerates bail constitutes an unconstitutional taking. Plaintiffs seek a remand to the trial court to determine damages due them.

Defendants contend plaintiffs lack standing, plaintiffs are collaterally estopped from seeking post-exoneration interest, the county is not a proper defendant, and the retention of post-exoneration interest did not constitute a taking.

DISCUSSION

1. *Plaintiffs had standing to sue.*

Defendants' theory is that plaintiffs lack standing because they merely showed they deposited the cash, but did not establish they *owned* the money. The contention lacks merit.

Section 1297 provides: "*When money has been deposited, a receipt shall be issued in the name of the depositor.* If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying restitution to the victim or the Restitution Fund, fines, and costs, shall refund the surplus, if any, to the defendant. *If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person. . . .*" (Italics added.)

We conclude plaintiffs' undisputed status as depositors is sufficient to confer standing.

2. *No merit to defendants' collateral estoppel argument; Overland I did not involve the issue of post-exoneration interest.*

"Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) *the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated;* (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]" (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1, italics added.)

As set forth above, *Overland I* solely involved the trial court's ruling on the first cause of action for *pre-exoneration* interest. The issue of post-exoneration interest was not before us in that writ proceeding and we did not purport to address that issue. (*Overland I, supra,* 126 Cal.App.4th at p. 142, fn. 8.) Therefore, we reject defendants' collateral estoppel argument.

We now turn to the merits of the appeal.

3. *The obligation herein is contractual; delay in returning the bail deposit does not give rise to a taking claim.*

As explained in *Overland I,* the cash bail deposit is in the nature of a contract between the depositor

and the government. (*Overland I, supra,* 126 Cal.App.4th at p. 140.) Plaintiffs assert that be that as it may, the contract terminates at the moment the trial court exonerates bail. The argument is unpersuasive. Pursuant to the statutory framework governing cash bail, the court defendants were contractually obligated to return the cash bail deposit only *after* exoneration.

The contractual obligation herein "is defined by statute as well as by the language of the contract. [Citation.]" (*Overland I, supra,* 126 Cal.App.4th at p. 141.) Section 1297 provides in relevant part: "If the person to whom the receipt for the deposit was issued was not the defendant, *the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt,* and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail." (Italics added.)

Therefore, we reject plaintiffs' contention the contract requires exoneration of bail and return of the deposit to be simultaneous. Unreasonable delay in returning the bail deposit conceivably could give rise to a contract claim.[7] However, delay in returning the bail deposit does not constitute a taking.

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[7] That issue is addressed in the next section of the opinion.

4. *Plaintiffs have waived their argument that the delay in refunding the bail money constitutes a breach of contract.*

On remand following *Overland I,* plaintiffs contended they were entitled to *post-exoneration* interest (second cause of action) to compensate them for the 42 or 45 day interval between exoneration by the court and refund of the monies. The proceedings on remand involved plaintiffs' theory the denial of post-exoneration interest amounted to an unconstitutional taking. Plaintiffs did not plead or argue that delay in refunding the bail money constituted a breach of contract for which they were entitled to damages.

The proceedings on remand were as follows:

The plaintiffs filed a motion for summary judgment or in the alternative, for summary adjudication, contending that as a matter of law, the undisputed facts established that defendants had taken plaintiffs' property, namely, the post-exoneration interest earned on the cash bail deposits, without just compensation.

The County defendants filed a competing motion for summary judgment or in the alternative, for summary adjudication.

The Court defendants also filed a motion for summary judgment or in the alternative, for judgment on the pleadings, contending plaintiffs had not alleged facts sufficient to state a takings claim and

any delay in returning the money did not support a taking claim.

In ruling on the matter, the trial court found no requirement that the money be restored instantaneously, it rejected the taking claim and granted summary judgment or judgment on the pleadings for defendants.

On appeal, plaintiffs continued to adhere exclusively to their taking theory. For example, the appellants' reply brief states at page three: "Appellants have never sought contract damages for the delay in returning the cash principal." Similarly, page six thereof asserts "the right to the interest actually earned post exoneration is not dependent on any contractual rights under the bail contract identified in *Overland I,* but rather is governed by the Takings Clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment."

At the time of oral argument, the issue of contract damages was raised by this court on its own motion and this court requested supplemental briefing on the issue. However, we now conclude it is inappropriate at this juncture to inject the contract theory into this case.

It is well settled that on summary judgment, the issues are "framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading."

(*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.)

Here, until the filing of their supplemental brief on appeal, plaintiffs have expressly eschewed a contract theory and have proceeded exclusively on their theory that denial of post-exoneration interest amounts to an unconstitutional taking. Given the state of the pleadings, the defendants were not required to negate a breach of contract claim in order to be entitled to summary judgment.

Had the plaintiffs properly raised their breach of contract claim in the trial court, defendants could have asserted any applicable contract defenses in moving for summary judgment. According to defendants, those defenses would have included: failure to file a government claim; statute of limitations; delay resulting from failure of plaintiffs to submit a proper receipt; Gov. Code section 12440 (warrant shall not be drawn unless authorized by law and unless specific appropriation available to meet it); and lack of privity.

Admittedly, plaintiffs might have pled a viable claim for breach of contract based on defendants' delay in refunding the bail money after exoneration. However, it is too late to change the theory of the case at this late stage. It would be unfair to the defendants to reverse the grant of summary judgment in order to afford the plaintiffs to relitigate this matter as a contract action, especially because plaintiffs have expressly eschewed a contract claim until now.

Therefore, the contract claim is waived by plaintiffs' failure to raise it earlier.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI, and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated, Plaintiffs, v. THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS	Case No. BC302996 [Complex Civil, Hon. Ronald L. Bauer, Judge of the Orange County Superior court, sitting by designation] **[PROPOSED] JUDGMENT IN FAVOR OF JOHN A. CLARKE, THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, J. TYLER McCAULEY, AND THE COUNTY OF LOS ANGELES**

ANGELES; J. TYLER MCCAULEY, Auditor-Controller for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities Defendants.	(Filed Jun. 23, 2006)

On May 15, 2006, Defendants John A. Clarke and the Superior court of California, County of Los Angeles' Motion for Judgment on the Pleadings or, In the Alternative, Summary Judgment, and J. Tyler McCauley and The County of Los Angeles' Motion for Summary Judgment came on for hearing, the Honorable Ronald L. Bauer presiding. All parties appeared through counsel of record. For the reasons stated in the motions and at the hearing, and good cause showing, this Court granted the motions and ordered entry of judgment as requested.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of John A. Clarke, the Superior Court of California, County of Los Angeles, J. Tyler McCauley, and

the County of Los Angeles on each of Plaintiffs' claims. Plaintiffs shall take nothing. John A. Clarke, the Superior Court of California, County of Los Angeles, J. Tyler McCauley, and the County of Los Angeles shall have costs in the amount of $_____ from Plaintiff's Mark E. Overland, Pamela Poloski, and Overland & Borenstein LLP.

Dated: June 23, 2006

RONALD L. BAUER
Hon. Ronald L. Bauer
Judge of the Orange
County Superior Court,
sitting by designation

Court of Appeal, Second Appellate District,
Division Three – No. B175442
S132137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK E. OVERLAND et al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

COUNTY OF LOS ANGELES et al.,
Real Parties in Interest.

(Filed May 11, 2005)

Petition for review DENIED.

GEORGE
Chief Justice

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 11, 2005

Mr. Mark A Borenstein
Overland Borenstein Schepet & Kim LLP
300 South Grand Avenue
Suite 2750
Los Angeles, CA 90071

Re: Mark E. Overland, et al.
v. Los Angeles County, California, et al.
No. 05-194.

Dear Mr. Borenstein:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARK E. OVERLAND et al., Plaintiffs and Appellants, v. JOHN A. CLARKE, as Executive Officer and Clerk, etc., et al., Defendants and Respondents.	B193743 (Los Angeles County Super. Ct. No. BC302996) ORDER DENYING REHEARING (Filed Oct. 16, 2007)

THE COURT:

The petition for rehearing contends this court erred in concluding that appellants waived a breach of contract theory. However, as noted in the opinion, the appellants' reply brief stated in no uncertain terms: "*Appellants have never sought contract damages for the delay in returning the cash principal.*" (Italics added.)[1] Appellants prosecuted this appeal solely on the theory that defendants' retention of post-exoneration interest amounted to an unconstitutional taking.

[1] The petition for rehearing, in a footnote, characterizes this statement in the reply brief as "admittedly confusing."

Further, the issue of unjust enrichment was belatedly raised in the reply brief. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

Appellants cannot continue to enlarge the issues on appeal in order to stave off summary judgment. The petition for rehearing is denied.

Court of Appeal, Second Appellate District,
Div. 3 – No. B193743
S158020

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK E. OVERLAND, et al.,
Plaintiffs and Appellants,

v.

JOHN A. CLARKE, as Executive Officer, etc., et al.,
Defendants and Respondents.

(Filed Dec. 12, 2007)

The petition for review is denied.

GEORGE
Chief Justice

Cal. Penal Code section 1297

When money has been deposited, a receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk shall, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying restitution to the victim or the Restitution Fund, fines, and costs, shall refund the surplus, if any, to the defendant. If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to that person within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail.

Cal. Penal Code section 1298

In lieu of a deposit of money, the defendant or any other person may deposit bonds of the United States or of the State of California of the face value of the cash deposit required, and these bonds shall be treated in the same manner as a deposit of money or the defendant or any other person may give as security any equity in real property which he or she owns, provided that no charge is made to the defendant or any other person for the giving as security of any equity in real property. A hearing, at which witnesses may be called or examined, shall be held before the

magistrate to determine the value of the equity and if the magistrate finds that the value of the equity is equal to twice the amount of the cash deposit required he or she shall allow the bail. The clerk shall, under order of the court, when occasion arises therefor, sell the bonds or the equity and apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied.

The county treasurer shall, upon request of the judge, keep the deposit and return it to the clerk on order of the judge.

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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI; and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated, Plaintiffs, vs. THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; J. TYLER McCAULEY, Auditor-Controller for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF	) Case No. BC 302996)) **Assigned to the Honorable Ronald L. Bauer**)) **NOTICE OF APPEAL; ELECTION TO PROCEED BY APPENDIX IN LIEU OF CLERK'S TRANSCRIPT (Cal. R. Ct. R. 5.1); DESIGNATION OF REPORTER'S TRANSCRIPT (Cal. R. Ct. R. 4(a))**)) (Filed Aug. 28, 2006))) Complaint Filed:) September 26, 2003

CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities; and DOES 1 through 25, inclusive,

Defendants.

TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Plaintiff/Petitioner MARK E. OVERLAND, PAMELA POLOSKI AND OVERLAND & BORENSTEIN LLP (collectively, "Plaintiffs") hereby appeal to the California Court of Appeal for the Second Appellate District from the order granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (the "Order") entered by the Honorable Ronald L. Bauer, Judge of the Orange County Superior Court on June 23, 2006. A copy of the Order is attached hereto as Exhibit 1.

Election to Proceed by Rule 5.1

NOTICE IS ALSO GIVEN that Plaintiffs elect to proceed by Appendix in lieu of Clerk's Transcript under Rule 5.1 of the California Rules of Court.

Designation of Reporter's Transcript

NOTICE IS ALSO GIVEN that Plaintiffs designate the following transcripts for inclusion in the reporter's transcript in accordance with Rule 4(a):

1. All oral proceedings heard on the Motions for Summary Judgment, held on May 15, 2006 in Department CX103 of the Orange County Superior Court, the Honorable Ronald L. Bauer presiding and reported by Jennifer L. Scott, CSR #9218.

The Fee Waiver of Reporter Jennifer Scott for the above-designated transcript is attached hereto as Exhibit 2 in lieu of a deposit in accordance with Rule 4(b)(3) of the California Rules of Court.

Dated: August 28, 2006

OVERLAND BORENSTEIN
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MARK A. BORENSTEIN
KRISTIN KNOX ESCHE

By: /s/ Kristin Knox Esche
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MARK E. OVERLAND; PAMELA POLOSKI; and OVERLAND & BORENSTEIN LLP, for themselves and for all persons and entities similarly situated,

Plaintiffs,

v.

THE COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; J. TYLER McCAULEY, Auditor-Controller

Case No. BC302996

[Complex Civil, Hon. Ronald L. Bauer, Judge of the Orange County Superior Court, sitting by designation]

NOTICE OF ENTRY OF JUDGMENT

for the County of Los Angeles, in his individual and official capacities; SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY; JOHN A. CLARKE, Executive Officer/Clerk of the Los Angeles County Superior Court, in his individual and official capacities; and DOES 1 through 25, inclusive,

Defendants.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on June 23, 2006 the Court in the above-entitled action entered Judgment in favor of Johan A. Clark, The Superior Court of California, County of Los Angeles, J. Tyler McCauley, and the County of Los Angeles. A copy of the judgment is attached hereto as Exhibit A.

Dated: June 29, 2006

DAVID F. MCDOWELL
MICHAEL J. BOSTROM
MORRISON & FOERSTER LLP

By: /s/ Michael J. Bostrom
Michael J. Bostrom
Attorneys for Defendants
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES AND JOHN A. CLARKE, EXECUTIVE OFFICER AND CLERK OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES